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SUPREME COURT OF THE UNITED STATES

.....Term, 1942

No.....

BLANCHE W. BARCO, as Executrix of the Estate of SAMUEL J. BARCO, Deceased; WALTER L. HARRIS, as Trustee of said Estate; BETTY BARCO and JACK BARCO, a Minor, by BLANCHE W. BARCO, His Mother and Next Friend,

Petitioners and
Appellants below,

v.

THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation,

Respondent and
Appellee below.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Brief in Support Thereof.

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.
SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a suit in equity, brought in the Circuit Court of Dade County, Florida in August 1939 by Samuel J. Barco, as insured, against The Penn Mutual Life Insurance Company of Philadelphia, as insurer, to reinstate a life policy, surrendered by him, as its terms allowed, because of his inability to pay a premium supposed due on July 25, 1938. The suit was removed to the United States District Court for the Southern District of Florida, Miami Division (Supp. T. 13). On October 10, 1939 Mr. Barco died, and his widow, as his executrix, and his two children, as beneficiaries of the policy's death benefit, amended the complaint so as to seek recovery not only of the monthly disability benefits for which Mr. Barco had sued, but also of the death benefit (T. 2-6 and 28-31). The essential allegation for the policy's reinstatement was that its surrender was caused by a mutual mistake of the existing fact that insured had been totally disabled for three months prior to July 25, 1938.

Other facts alleged were (a) that by reason of his Christian Science faith, and his practitioner's service, Barco did not believe his disability total or permanent until July, 1939, when (on August 2, 1939) he wrote the insurer offering to furnish proof of it, and (b) that the policy was issued in April 1925 for $100,000, reduced to $50,000 in January 1937, that the premiums paid for the

thirteen years were about $39,000, and by the policy's terms if Mr. Barco had given notice of his disability on July 25, 1938, he would not have had to pay any premium then or thereafter, would have gotten a disability benefit of $250.00 per month until his death, and his children the death benefit less a loan note of $10,473.76.

The defendant moved to dismiss said amended complaint. The District Judge denied that motion. At the final hearing all of said alleged facts were proved or conceded by insurer's answer, and the District Judge so held (Findings of Fact 234-6), but stated that his view of the law had changed (Discussion 239) so he then found for defendant. An appeal was taken to the United States Circuit Court of Appeals for the Fifth Circuit. On that appeal the issues presented were (a) that the District Judge had erred in failing to follow the law in the case of **Minnesota Mutual Life Ins. Co. v. Marshall** (8 Cir.), 29 F. (2d) 977, approved by this court in the case of **Bergholm v. Peoria Life Ins. Co.**, 284 U.S. 489, and (b) that the District Judge had erred in failing to follow Florida law as shown in three Florida cases (named in annexed brief) which hold that notice of disability is excused if the giving of it is "unreasonable". That court affirmed the decree of the district court. A petition for rehearing was filed and denied.

II.
REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals for the Fifth Circuit has in this case rendered a decision in conflict with the decision on a similar matter of the Circuit Court of Appeals for the Eighth Circuit in the case of **Minnesota Mutual Life Ins. Co. v. Marshall**, 29 F. (2d) 977, which case waives proof of existing disability if it exists before default in a premium payment.

2. The Circuit Court of Appeals for the Fifth Circuit has in this case decided an important question of local (Florida) law in a way probably in conflict with the applicable local (Florida) decisions in the Tharpe, Hallowes and Lynch cases (cited in paragraph II(4)) of the annexed brief, holding that the furnishing of proof of disability is waived if its furnishing is unreasonable.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Fifth Circuit had in the case numbered and entitled on its docket, No. 9990, Blanche W. Barco, as Executrix of the Estate of Samuel J. Barco, deceased, et al., Appellants, v. The Penn Mutual Life Insurance Company of Philadelphia, Appellee, to the end that this cause may be reviewed and determined

by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Fifth Circuit be reversed by the court, and for such further relief as to this court may seem proper.

Dated May 19, 1942.

BATCHELOR & DYER
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